No. 41921-1-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

COLIN YOUNG

Appellant,

v.

DAVID AMBAUEN AND JANA AMBAUEN

Respondents.

BRIEF OF RESPONDENTS, DAVID AMBAUEN AND JANA AMBAUEN

Counsel on Appeal for Respondents
David Ambauen and Jana Ambauen:

David M. Jacobi, WSBA #13524
Shawnmarie Stanton, WSBA #20112
WILSON SMITH COCHRAN DICKERSON
901 Fifth Avenue, Suite 1700
Seattle, Washington 98164-2050
Telephone 206.623.4100
Facsimile 206.623.9273
Electronic Mail:
jacobi@wscd.com; stanton@wscd.com

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I. INTRODUCTION

The Ambauens lived in rural Big Valley, seeking a bucolic life in the unspoiled countryside. Instead, they found themselves living next to Mr. Young – the neighbor from hell, who kept over a hundred decrepit "historic vehicles" in plain sight, rusting in the rain near a pond and wetland that straddled the two properties. When the Ambauens decided to take legal action to have the junk cars removed, they found themselves embroiled in years of litigation with Mr. Young who, along with his penchant for keeping a junkyard on his property, also fancies himself an amateur attorney. In response to their suit seeking to compel him to remove the junk cars from his property, Mr. Young counterclaimed for "trespass, timber trespass and waste."

The trial court granted summary judgment in favor of the Ambauens and awarded their attorney fees as permitted by statute and court rule, in an amount well substantiated by affidavit of counsel.

Mr. Young took his counterclaims to mandatory arbitration. He lost.

Mr. Young demanded trial *de novo*. He failed to provide any substantial evidence that the Ambauens had "trespassed" on his property without express or implied permission, much less that they had damaged his property in any way. The jury found for the Ambauens and the trial court awarded the Ambauens' attorney fees and costs, again as provided by court rule and statute. Mr. Young lost.

Now Mr. Young is pursuing an appeal. His long awaited, 74-page opening brief fails to raise any substantial issues for appellate review. Instead, Mr. Young relies on an extended statement of facts that is largely unsupported by citation to the record; on assignments of error that were not preserved in the trial court; and on asserted "errors" that were merely the trial court's sound exercise of its discretion to manage discovery and trial.

Mr. Young has had his day in court – for many years now. It is time to put an end to the protracted litigation of his spurious counterclaims. As this brief will establish, with extensive citations to the record, Mr. Young failed to rebut the Ambauen's affirmative claim for improperly storing cars on his property in violation of local law. Mr. Young also failed to make out a claim of trespass, waste, timber trespass, or any other cognizable cause of action against the Ambauens, who have by now moved away from the property they loved in Big Valley. Like any litigant, represented or *pro se*, Mr. Young is entitled to be heard and to be respected. So are the Ambauens. It is time for their adventure in litigation with Mr. Young to come to an end and time for the courts to clear this matter from their dockets.

This Court should affirm the judgment and award of attorney fees and costs against Mr. Young on the Ambauens' affirmative claims; affirm the dismissal of his counterclaims against the Ambauens and the trial court's award of fees and costs at the conclusion of the trial *de novo*; and award the Ambauens their attorney fees and costs on appeal.

II. SYNOPSIS OF THE ASSIGNMENTS OF ERROR

It appears that Mr. Young has assigned error to the following decisions of the trial court:

1. The court's decision to award the Ambauens their attorney fees after they prevailed on their motion for summary judgment regarding their claims against Mr. Young.

2. The amount of attorney fees the court awarded to the Ambauens after they prevailed on their summary judgment motion.

3. The court's denial of Mr. Young's motion in limine regarding testimony and evidence concerning the scores of junk, or as Mr. Young calls them, "rare and historic" automobiles he stored in plain view and in various areas of his property.

4. The court's decision to exclude an expert witness Mr. Young failed to timely disclose, and whose testimony was likely to duplicate the testimony of another expert who did testify for Mr. Young.

5. The court's decision to limit Mr. Young's cross-examination of the Ambauen's expert witness, Marc Boule, regarding permitting and other requirements.

6. The court's decision not to give Young's proposed jury instructions 11, 15, 16, 18 – 20, 23 and 24.

7. The court's decision to adopt jury instruction 8, defining "trespass."

8. The award of attorney fees to the Ambauens because Mr. Young failed to improve his position in a trial *de novo,* after an adverse ruling in a mandatory arbitration proceeding on his claims.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court properly award the Ambauens their attorney fees following their successful summary judgment motion when the Ambauens timely made their request and an award of attorney fees is mandated by KCC 9.56(3)(b)(4) and KCC 17.530.030?

2. Did the trial court properly exercise its discretion in denying Mr. Young's motion in limine regarding testimony and evidence of the junk vehicles on Mr. Young's property when the record establishes there is only one photograph at issue and Mr. Young cites to nowhere in the record that the Ambauens used that photograph to raise the issue of the junk cars?

3. Did the trial court properly exercise its discretion in excluding Mr. Young's second expert witness when the testimony of that witness would have been cumulative and the exclusion was, therefore, supported by ER 403 and CR 16(a)(4)?

4. Did the trial court properly exercise its discretion in limiting some of Mr. Young's questioning of expert witness Marc Boule when the record establishes Mr. Young was allowed to question Mr. Boule extensively on all relevant matter?

5. Did the trial court properly exercise its discretion in instructing the jury on the claim of trespass, but not waste or timber trespass, when the record establishes Mr. Young's proposed waste instruction did not correctly state the law and Mr. Young failed to present substantial evidence of waste or timber trespass?

6. Did the trial court properly award the Ambauens their attorney fees under RCW 7.06.060(2) because Mr. Young failed to improve his position on the trial *de novo*?

7. Should this Court award the Ambauens their attorney fees on appeal based upon RCW 7.06.060(2) and RAP 18.1?

IV. STATEMENT OF THE CASE

A. Facts From Filing Through Arbitration

1. Ambauens' Motion for Partial Summary Judgment

Tired of sharing their pristine residence in rural Big Valley north of Poulsbo with Colin Young's *de facto* junkyard next door, Dave and Jana Ambauen decided to take action. After watching legal gymnastics between Kitsap County enforcement officers and their neighbor Colin Young for years, Mr. and Mrs. Ambauen retained an attorney with their own funds and filed the present action against Colin Young for injunctive relief and damages in March of 2004. (CP 1 – 5). Because the rural property owned by Colin Young had been transferred to him by his mother, Lorna Young, during the

county enforcement actions, both of the Youngs were named Defendants. (CP 33 – 34)

Appearing *pro se*, Mr. Young filed an answer, affirmative defenses and a counterclaim. (CP 14 – 21)

In July 2005, the Ambauens moved for partial summary judgment, seeking an order requiring Mr. Young to remove "all junk motor vehicles currently stored" on his property. (CP 46 – 47) In his Declaration, Mr. Ambauen testified that, "[a]s of June 2005, approximately 120 junk cars" were located on Mr. Young's property. (CP 62) In the memorandum in support of their motion, the Ambauens noted that, pursuant Kitsap County Zoning Code Title 17.430.020(X), up to six motor vehicles could be stored on property if they are completely screened by a sight-obscuring fence or natural vegetation; and that they must not be stored closer than 250 from any property line. (CP 53)

Mr. Young responded that the cars stored on his property were "rare and historic." (CP 88 – 89)[1]

The trial court granted the Ambauens' motion, entering an order on August 26, 2005, that allowed Mr. Young 90 days "to remove all vehicles in excess of those allowed to be stored." (CP 147 – 149) Shortly thereafter, a stipulation and order was entered dismissing Lorna Young as a Defendant.

[1] In previous legal proceedings with Kitsap County, Young argued that the County nuisance ordinance was unconstitutional. He ultimately lost that challenge. (CP 98 – 106)

(CP 152 – 54) Mr. Young attempted to appeal the order in favor of the Ambauens, but this Court declined discretionary review in a decision dated March 6, 2006. (CP 155 – 160)

On May 17, 2007, the Ambauens filed a motion for attorney fees. (CP 161 – 176) The motion included a declaration from the Ambauens' counsel, along with a detailed accounting of his legal services and billings. (CP 164 – 176) Mr. Young opposed the motion for attorney fees, providing similar arguments to those he now advances on appeal. His arguments, then and now, are directed to the *amount* of fees awarded rather than the Ambauens' *entitlement* to fees. (CP 184 – 188)

Prior to the motion for fees, the Ambauens returned to court on several occasions requesting contempt orders and sanctions against Mr. Young for his failure to comply with the order to remove the many vehicles still strewn about his property. On August 26, 2005, the court held Mr. Young in contempt and began to impose penalties for his continuing violation of the court's injunction. Ultimately, the court imposed a monetary judgment against Young on March 30, 2007. (CP 194 [June 1, 2007, Order to Vacate Order of Contempt and Monetary Judgment of 3/30/07, which details the various orders of the court.])[2]

On June 1, 2007, the trial court entered an order awarding attorney fees to the Ambauens in the amount of $14,819.50. (CP 195 – 196) An order

[2] Some two years after the court's original order, Young finally complied by removing his cars from the Big Valley property. (CP 194)

was also entered forgiving the previous contempt penalties based on Young's eventual removal of the cars. (CP 194) The attorney fee award was paid and a satisfaction of judgment was filed. (CP 235 – 236)

Mr. Young then proceeded to slowly move the cars back on to the Big Valley property. Another contempt order was entered in 2010. (CP 382 – 383) The court found Mr. Young was again storing cars at the property in violation of the court's order and the County ordinance. (CP 426:21 – 25) However, this order was later vacated, because the Ambauens had sold their home; and the trial court thus concluded they no longer had standing to assert their claims against Young. (CP 499)

2. Mr. Young's Counterclaim and the Arbitration

The properties owned by the Ambauens and Mr. Young both include wetlands and share a man-made pond. There is an island in the pond that is also located on both properties. In his counterclaim, Mr. Young alleged Mr. Ambauen filled portions of the wetlands located on his property with sand, destroyed a nesting sanctuary located on the island, constructed a bridge to the island that was located almost entirely on Young's property, excavated a creek and piled yard waste on Young's property. (CP 18) He also alleged the Ambauens "have unlawfully mowed down the natural vegetation on, and near, Young's wetlands, limbed trees, cut hay, cultivated trees, and generally pretend to own land they clearly know they don't." (CP 18 – 19) Mr. Young

prayed for judgment against the Ambauens "in the amount of $45,000." (CP 21)

On November 6, 2007, the Ambauens filed a pleading entitled Note for Arbitration Setting Initial Statement of Arbitrability. (CP 233 – 234) They checked the box next to the statement, "This case is subject to arbitration because the sole relief sought is a money judgment and involves no claim in excess of $50,000 exclusive of attorney fees, interest and costs. (MAR 1.2)" (CP 233) In his Answer, Mr. Young had included a Third Party Complaint against Janet S. Plemmons. (CP 19 – 21) However, he did not serve Ms. Plemmons. The existence of that claim prevented the Clerk from noting an arbitration when the Ambauens filed their Statement of Arbitrability. The Ambauens, therefore, filed a Motion to Compel Mandatory Arbitration of Defendant Young's Counterclaim on January 18, 2008. (CP 241 – 245)

Mr. Young responded to the Motion to Compel Mandatory Arbitration, complaining that he had not had enough time to prepare his case. (CP 272 – 273) Nowhere in his response did he claim his case exceeded the $50,000 jurisdictional limit for mandatory arbitration. On February 8, 2008, the court entered an Order compelling arbitration. (CP 291 – 92) Mr. Young filed his Prehearing Statement of Proof on June 30, 2008. (CP 294 – 302) Nowhere in that pleading did he allege the value of his claim was in excess of $50,000.

The matter proceeded to arbitration. The arbitrator found in favor of the Ambauens and held that Young should take nothing. On August 5, 2008, Mr. Young filed a Request for Trial *De Novo*. (CP 342)

B. Pre-Trial and Trial

1. Exclusion of Mr. Young's Second Expert Witness

In September 2007, the Ambauens served interrogatories on Mr. Young, which included a request that he identify "all persons with knowledge of the facts relating to defendant Young's allegations as to" the Ambauens. (CP 518) Mr. Young disclosed Bradley Perry, Charles Hatch, and "[a] significant portion of the North Kitsap population." (*Id.*) On February 9, 2010, Mr. Young provided his trial witness list, which included additional witnesses. (CP 520) Seven months later, on November 19, 2010, Mr. Young disclosed for the first time expert witnesses Lisa Bernsten and Joe Callaghan of GeoEngineers. (CP 507) These witnesses were not disclosed in any supplements to the prior interrogatory answers, nor were they included on Mr. Young's original trial witness list. The Ambauens' attorney asked what the witnesses' testimony would be and Mr. Young responded:

> These witnesses will compare and contrast Mr. Rodman's estimate and Mr. Boule's report (your expert) and to some degree present an objective 3rd party review detailing the impacts to and costs for restoration of the damaged area. . . .

(CP 507) In other words, these new witnesses would be called to comment on and critique the testimony of Mr. Young's other expert witness, as well as

the Ambauen's expert. Mr. Young later indicated that only Mr. Callaghan would be called to testify. (CP 509).

The Ambauens moved to exclude the late-disclosed witnesses, including Mr. Callaghan. (CP 500 – 503) In response, Mr. Young admitted he had received a copy of the report of Ambauens' expert witness, Marc Boule, in August 2010 – over three months before he disclosed his additional witnesses. (CP 522) He argued he had retained Mr. Callaghan in response to the Boule report. (*Id.*) However, Mr. Young had already retained expert witness Robert Rodman, who provided his own opinions concerning the damage allegedly caused by the Ambauens and the cost to restore the allegedly damaged Young property. (CP 332 – 333) The Ambauens retained Mr. Boule to respond to Mr. Rodman's opinions and provide an opinion on the same issues. (CP 526 – 530) Mr. Boule disagreed with Mr. Rodman's conclusions that restoration of the pond site was necessary. (CP 529) He further disagreed with Mr. Rodman's cost estimation. (CP 529) Upon receiving Mr. Boule's report, Mr. Young apparently decided he would rather not rely on Mr. Rodman to address the damages issues, at which point he retained Mr. Callaghan.[3]

The trial court considered the Motion to Exclude on January 4, 2011. (RP 12:19 – 22:23) The Ambauens argued that Mr. Callaghan was merely duplicative of the expert Mr. Young had timely disclosed and was also

[3] The Clerk's Papers do not include a copy of Mr. Callaghan's complete report. Page one of that report can be found at CP 535.

planning to call at trial, Mr. Rodman. (RP 14:17 – 24) In response, Mr. Young explained that his new expert had more expertise than the expert he had originally retained. He admitted that maybe he "should have had a better" expert to start with. (RP 17:12 – 13) He further asserted that Mr. Rodman was old and "slipping a bit." (RP 17:18 – 19) If he was limited to one expert, his preference was to have the expert witness he had retained on the eve of trial. (RP 18:1 – 5).

The court concluded that Mr. Callaghan was presenting a new theory and it was prejudicial to the Ambauens "because this is a whole new theory that's been presented less than four weeks before trial, and taking into account also the holiday schedule. Even without that I don't know that, I don't know that the Ambauens could have obtained another expert, but it changes the whole preparation of the case and how the merits are perceived by the parties . . . ." (RP 22:15 – 22:21)

Mr. Young did not make an offer of proof at trial as to what Mr. Callaghan's testimony would have been.

2. Mr. Young's Motion in Limine

On August 11, 2009, Mr. Young filed a Motion in Limine in which he requested relief as follows:

> 3.1 Counterclaimant prays the court order the plaintiffs to preclude the presentation of any evidence or testimony relating to the storage of cars or plaintiff's [sic] use of the subject property for automotive activities, as previously addressed in the plaintiff's now concluded claims.

(CP 362)

Mr. Young confirms in his motion that he had a copy of the Ambauens' ER 904 submission, but he failed in his Motion in Limine to explain which specific exhibits he was asking the Court to exclude before trial began. (CP 360 – 362) The court heard argument on Mr. Young's Motion in Limine at the January 4, 2011, hearing. (RP 3:9 – 12:14; 29:3 – 31:19) The Ambauens argued that photographic evidence of the state of Mr. Young's property was necessary to place the litigation in context – *i.e.*, Mr. Young was storing decrepit "vehicles right next to the creek that he claims we [the Ambauens] damaged, very close to the wetlands that he says we damaged, so in terms of a waste claim, or damages claim, how he treated his property is relevant as well." (RP 6:16 – 22) The court concluded that photographic evidence was admissible to allow the Ambauens a "very brief inquiry as to the timing of the suit and the context that leads us here today." (RP 31:8 – 10)

The court specifically indicated that the evidence "would be subject to objections by [Mr. Young] if it's going beyond just a context argument." (RP 31:12 – 14) Mr. Young stated he objected "on the basis because it only takes one picture to prejudice the jury, and if the court is going to risk that, then I am going to object to it formally." (RP 31:15 – 18). The court noted his objection (RP 31:19).

In his statement of the case, Mr. Young claims the trial court improperly "admitted numerous irrelevant and highly prejudicial photographs of Young's vehicles, including exhibit #10[.]"[4] However, he does not cite to the record, nor does he explain what exhibits other than Exhibit No. 10 were wrongfully admitted by the trial court. Likewise, in the argument section of his brief he refers only to Exhibit No. 10.[5] It is, therefore, impossible to determine what other evidence Mr. Young contends were improperly admitted by the trial court.

Exhibit No. 10 was described on the record as an "aerial photograph" that Mr. Ambauen would testify was an "accurate representation of the property, which is where he lived for 15-plus years, and that it fairly represents the boundaries and the properties of the area." (RP 75:22 – 3) Mr. Young objected on the basis that the date of the photograph was not known and that the photograph would be prejudicial. (RP 76:7 – 11) The court concluded it "would allow it to be used as an illustrative exhibit[.]" (RP 76:17 – 20; 77:1 – 2)

During the trial, additional photographs were admitted into evidence. For example, Exhibit No. 21 was a collection of photos. (RP 179:1 – 18) When the Ambauens moved to admit those photos, Mr. Young specifically stated, "No objection." (VPR 180:21 – 22) Exhibit 20 was a photo of the Ambauens' garden. (RP 179:19 – 22) When the Ambauens moved to admit

[4] Opening Brief of Appellant at 12.
[5] *Id.* at 27, 29 and 32.

that photo, Mr. Young objected. (RP 179:23 – 180:1) The Ambauens' attorney explained the photo demonstrated the use of the Ambauens' property. (RP 180:2 – 7) The court allowed the photo to be admitted because Mr. Young had already questioned Ms. Ambauen as a witness and he had asked her "a number of questions regarding the property and the use of the property," so the photos were relevant. (RP 180:8 – 10)

Before testifying, Mr. Young again raised the issue of Exhibit No. 10. (RP 187:11 – 16) The court reiterated that the exhibit was "admitted as illustrative only." (RP 187:19 – 20) She explained that Mr. Young could also use a diagram of the property he had prepared as an illustrative exhibit. (RP 187:21 – 188:1)

Mr. Young also raised the issue of what he called "this tendency to submit photographs by the" Ambauens. (RP 188:20 – 22) The court asked him what photographs he was talking about and he responded, "There has been photographs that will be coming forward that I have been shown that were taken in 2008, 2009." (RP 189:12 – 14) The court responded, "When they are offered, then you can make your objections and I will consider them. I have not seen them." (RP 189:15 – 17)

3. Evidence at Trial

The evidence at trial demonstrated that, over the years, Mr. Ambauen had engaged in cleanup around the pond area and believed he was doing so with the consent of Mr. Young. The Ambauens purchased their property in

the early 1990's. Mr. Ambauen testified that Mr. Young gave him permission to do cleanup work in 1992 or 1993. (RP 401:4 – 5) Mr. Young's mother owned the property at that time. (RP 432:14 – 16) As to why Mr. Ambauen thought he still had permission to conduct cleanup work after Mr. Young was the owner of the property, he testified:

> . . . I guess I don't feel like you gave me carte blanche to, you know, to have free range of your property. What I understood that you had given me was authorization to clean out the creek that day while you were there, and then that it was a general agreement that we had as adjacent property owners that that was acceptable, mutually beneficial work that I was doing for your benefit.

(RP 433:7 – 15) This arrangement apparently worked out just fine, until the Ambauens sued Mr. Young because he had turned his property into a graveyard for old cars. It was only then that Mr. Young claimed the Ambauens were acting wrongfully by cleaning up the property.

a. "A Pile of Branches"

One of Mr. Young's claims was that the Ambauens had committed a timber trespass. However, at trial he presented no evidence to support that claim. Even his own testimony was insufficient to support a claim that the Ambauens had committed timber trespass. Mr. Young testified that he found a pile of branches with the ends cut on his side of the island. (RP 245:17 – 246:14) He presented a picture of the pile of branches. (Ex. 16, photo C-2). He concluded from the cut ends of the limbs that they had been cut from

trees. However, his own testimony indicated he really had no knowledge regarding the trees:

> Q. Mr. Young, how would you assess the damages to the trees in value?
> A. Well, there really wasn't any trees cut down. There may have been a small one or two. There's some evidence in one of the photographs that shows a small log there, and I have no idea where it came from. It could have been a tree at one time, but the trees –

(RP 263: 1 – 7).

Because Mr. Young had no basis for stating an opinion of the valuation of timber, the court did not allow him to testify as to the value of the "pile of branches" he claimed to have found. (RP 263:19 – 21) He presented no other evidence of the value or the improper cutting of any supposedly damaged or felled "timber."

Mr. Young's own expert witness, Robert Rodman, testified that when he was at the property he "didn't see any cut trees." (RP 334:18)

The Ambauens both confirmed, under oath, that they did not cut any trees down. When asked what she knew regarding the "pile of branches" Mr. Young believed to be evidence of "timber trepass," Mrs. Ambauen testified:

> Well, that pile of limbs is – those sticks were everywhere. Those wind storms that we have in November would knock down – I mean the place was just a mess if you didn't go around, and I didn't ever pick it up, it was all – my husband would do all that work out there and just pick it all up and pile it up, and whatever it took to clean it up so we could walk through there.

(RP 157:1 – 7)

Mr. Ambauen testified that he had one of his employees, Charles Deberry, mow and do cleanup work around the pond. (RP 375:19 – 25) He testified that Mr. Deberry "probably would have done pulling sticks and branches or fallen trees that had fallen into the pond." (RP 376:1 – 3) Mr. Ambauen was shown Exhibit No. 16, the photograph of the "pile of branches," and he confirmed the photograph showed the sort of work Mr. Deberry would have done, gathering up fallen limbs and debris. (RP 376:18 – 377: 4) The following exchange then occurred:

> Q. And do you have any knowledge of about where these limbs came from? Did you ever – Let me rephrase that question. Did you ever direct Mr. Deberry to cut the limbs off the trees?
> A. No.
> Q. Would he have done it on his own?
> A. I don't think so.

(RP 377:5 – 11) As to the pile of limbs depicted in the photograph, Mr. Ambauen testified:

> A. It's kind of a common pile. What happens in that pond is, is that the alders lose branches so the branches land in the water, they land on the island, so this pile on the island would have been cutting up a tree that would have fallen over, piling up all the branches that you could reach with a tater fork or something to pull them out of the water and pile them up to dry to burn later.

(RP 377:16 – 23) Mr. Ambauen testified that he cut limbs on his own property (RP 430:2 – 3), but when asked whether he "cut any limbs off the trees on the north side of the pond," he answered, "No." (RP 420:4 – 6) He

further testified that Mr. Young had logged his own property so the "tree canopy north of the pond is totally gone." (RP 529:3 – 5; 529:16 – 23).

b. "Salmonberry Bushes"

Mr. Young testified that an area around the pond had been cleared of salmonberry bushes. (RP 236:16 – 25) However, testimony from his own expert witness, Mr. Rodman, confirmed that salmonberry bushes were growing in the same area at the time of trial. (RP 305:6 – 7)

Mr. Ambauen testified that, in October 2003, he cleaned debris out of the pond with a backhoe and spread it over the grass with the backblade. (RP 418:6 – 419:3; 420:15 – 18) He then spread hay over the area "to try to protect from erosion and try to get – to get it to reseed as quickly as possible." (RP 420:19 – 25) He testified that he had not removed the salmonberry bushes. (RP 423: 13 – 15; 447:4 – 6) He further testified that the picture of the area submitted by Mr. Young showed salmonberry bushes in the area. (RP 423:24 – 424:7)

The Ambauens' expert witness, Marc Boule, testified, just as Mr. Rodman did, that he had observed salmonberry bushes growing in the area around the pond. (RP 464:3 – 8; 464:19 – 21).

c. Additional "Evidence" of Alleged "Trespass"

During trial, Mr. Young attempted to make much of four other types of supposed "evidence of trespass." He claimed that the Ambauens allowed a rowboat to be on his property; took a roll of old fencing that was on his

property; built a bridge to the island that was partially over the property line, and cut hay on his property.

The evidence of the rowboat consisted of Mr. Young's own testimony that there was a rowboat on his property that did not belong to him – and that one day it "disappeared." (RP 253:19 – 254:10) With regard to the fencing, he testified that he was going to put a fence up and "deposited the roll of 48-inch sheep fencing" where he was going to build the fence. (RP 253:8 – 15) He further testified, "I guess I came back three weeks later and the fencing had been removed." (RP 253:16 – 18)

The evidence regarding the bridge again consisted of Mr. Young's own testimony that the Ambauens had constructed a bridge to the island and that it was on his property. (RP 211:4 – 5) He did not present any other evidence that the bridge was partially on his property. Mr. Ambauen testified that the bridge was entirely on the Ambauens' property. (RP 394:6 – 15) Mr. Young testified that he first became aware of the bridge in 1999. (RP 218:21 – 23) He confirmed on cross-examination that he had never asked the Ambauens to remove the bridge. (RP 269:13 – 17).

With regard to the hay, Mr. Young claimed the Ambauens mowed a small strip of his land and "from a monetary standpoint and the extent of this claim, this really wasn't a big issue, but to me it was important because it was a trespass[.]" (RP 222:11 – 25).

4. Jury Instructions

Before trial, the parties submitted their proposed jury instructions and verdict forms. (CP 536 – 560; 577 – 609) The court chose which instructions to give and provided a set to the parties for review and objections. (RP 548:1 – 13) The court allowed Mr. Young to engage in extensive argument about the instructions the day the court provided the parties with a copy of the instructions it had decided to give, as well as the following morning. (1/11/11 RP 2:8 – 18:7) Mr. Young objected to the court's decision not to give his proposed instruction number 19 on timber trespass. (RP 549:8 – 17; CP 602) Specifically, Mr. Young stated during argument, "I would object to that instruction for ornamental shrubbery and timber trespass being removed from consideration by the jury." (RP 550:11 – 13) He also objected to the court not giving his proposed instruction number 18 on waste. (RP 550:24 – 551:1; CP 601)

The court found there was insufficient evidence to warrant an instruction on timber trespass:

> As to the timber trespass, there is insufficient evidence for the court to give that instruction. While there is testimony regarding salmonberry, there is no number of salmonberry plants that's in testimony, or any method to assess the damages to the salmonberries, so I decline to give the timber trespass instruction.

(RP 552:5 – 11; see also 1/1/11 RP 7:8 – 13) After allowing additional argument regarding the waste instruction, the court also found insufficient evidence to support that proposed instruction:

> There's insufficient evidence of damages that occurred for waste or for the timber trespass. I am declining to give those instructions, but your objections are noted for the record, and you are taking exception to the court not giving your proposed instruction number 18 and proposed instruction number 19.

(RP 555:25 – 556:6) She also noted that there was no cite to a Washington Pattern Instruction or a statute in that proposed instruction and was an inaccurate statement of the law. (1/11/11 RP 8: 20 – 22; 1/11/11 RP 9:9 – 12)

Mr. Young also objected to the court's omission of his proposed instruction number 20.[6] (1/11/11 RP 16:11 – 14; CP 604)

Mr. Young also objected to the omission of his proposed instruction 15, a rambling, four-page account of his various allegations and claims. The court found this to be a "comment on the evidence," and not a proper instruction on the law:

> Your proposed instruction number 15 is really a comment on the evidence I believe, the way it was put together, and so the jury comes up with a number. If they find in your favor, they come up with a number based on the testimony that's been presented. They can accept or disregard the testimony.

(RP 556:12 – 18)

Mr. Young did not object to the trial court's decision not to give any of his other proposed instructions, nor did he object to the court's decision to give instruction number 8 (CP 640), the trespass instruction offered by the

[6] It appears the trial court mistakenly referred to Mr. Young's proposed instruction number 20 as number 21. The court noted an object to number 21, but the proposed instruction submitted by Mr. Young did not include an instruction with that number.

Ambauens, yet he now attempts to assigns error to the court's decision regarding these other instructions.

V. ARGUMENT

A. Standard of Review

As addressed more specifically in conjunction with each argument below, the standard of review for each of Mr. Young's assigned errors is abuse of discretion.

B. The trial court properly awarded the Ambauens their attorney fees after they successfully moved for summary judgment.

As discussed below, the trial court awarded the Ambauens their attorney fees on their successful summary judgment motion, under statutory provisions that gave them the right to recover prevailing party fees and costs. The Washington Supreme Court "has held that an award of attorney fees that is authorized by statute is left to the trial court's discretion and will not be disturbed 'in the absence of a clear showing of abuse of discretion'."[7] The trial court did not abuse its discretion in awarding the Ambauens their fees, or in determining the amount to be awarded.

1. Mr. Young's arguments have been waived through his failure to object at the trial court level.

As a matter of fairness to the trial court and other parties, the appellate court "may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). Mr. Young assigns error to the trial court's

[7] *Fluke Capital and Management Services Co. v. Richmond*, 106 Wn.2d 614, 625, 724 P.2d 356 (1986) (quoting *Marketing Unlimited, Inc. v. Jefferson Chemical Co.*, 90 Wn.2d 410, 412, 583 P.2d 630 (1978)).

decision to award the Ambauens their attorney fees. However, the pleadings and transcript from the June 1, 2007, hearing on the Ambauens' attorney fee motion clearly evidence Mr. Young's failure to object to the Ambauens' entitlement to fees. Instead Mr. Young challenged the amount of fees claimed.

At the fee hearing, the Ambauens' attorney made a record on this point. Specifically, he noted he had "not received any written objection from Mr. Young and he's presented no argument on the issue of entitlement to fees." (6/1/07 RP 7:9 – 11) The objection raised by Mr. Young at the trial court level "has to do with the amount of the fees," not entitlement to fees under Washington statute. (6/1/07 RP 7:11 – 12) Further, Mr. Young did not raise an entitlement objection in his Motion for Reconsideration filed June 11, 2007. (CP 199 – 207)

2. The Ambauens' request for attorney fees was timely under CR 54.

Mr. Young claims the Ambauens' request for attorney fees and costs was untimely.[8] In addition to this being a new issue raised for the first time on appeal, it is specious on its face. CR 54(d)(2) provides that "[c]laims for attorney fees and expenses, other than costs and disbursements, shall be made by motion . . . no later than ten days after *entry of judgment*."[9]

An "entry of judgment" means that the case is resolved and there is finality of all matters in the case. It is axiomatic that "a matter is not final

[8] Opening Brief of Appellant at 14 – 18.
[9] Emphasis added.

until all remaining issues between all remaining parties are resolved."[10] Moreover, CR 54(b) provides that "any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties." It is, therefore, clear that the ten-day filing period is not triggered until a final judgment is entered.

After the trial court granted partial summary judgment to the Ambauens, Mr. Young proceeded to arbitration on his counterclaims. He then appealed the arbitration decision and a jury trial was held. (CP 342) A final judgment was entered against Young on February 17, 2011. (CP 725 – 728)

By requiring a final judgment, Rule 54 simplifies fee determinations when a case is on-going. The Ambauens were awarded fees at several stages of this litigation under the contempt statute, the nuisance law and the MARs.

Mr. Young fails to properly apply the law in his argument that the Ambauens have violated Rule 54's ten-day filing limitation. Mr. Young's misinterpretation of the law and ill-founded legal conclusions should be ignored. A misguided interpretation of legal doctrine can lead to meritless appeals such as this, where the law's application is straightforward.

3. The Ambauens were properly awarded their attorney fees and costs as prevailing parties.

The Ambauens are entitled to their attorney fees according to statute,

[10] *Mehlenbacher v. Dermont*, 103 Wn. App. 240, 246, 246 11 P.3d 871 (2000).

which is one of the three prescribed avenues for a court to make such an award.[11] The statute itself determines in what circumstances an award is appropriate and the statutes relied upon by the Ambauens do not require that a party be the prevailing party to recover attorney fees.

The initial award of attorney fees for the Ambauens' public nuisance cause of action was made pursuant to Kitsap County Code (hereinafter KCC) Chapter 17.530. This statute allows recovery of costs when a suit is brought under the County nuisance law, KCC 9.56.

KCC 9.56(3)(b)(4) provides that "[t]he costs of correcting a condition which constitutes a nuisance under this chapter, including all incidental expenses, shall be billed to the person responsible for the nuisance." The statute explains "incidental expenses includes, but is not limited to, personnel costs, both direct and indirect and including attorney fees." Similarly without prevailing language, KCC 17.530.030 provides that "costs of such a [public nuisance] suit shall be taxed against the person found to have violated this title."

The trial court determined that a nuisance existed on Mr. Young's property as a matter of law. This determination triggered the Ambauens' entitlement to fees.

The other statutory basis for the award of attorney fees is RCW 7.21.030(3). This contempt statute also lacks a prevailing party requirement. It simply states that any costs "incurred in connection with the contempt

[11] *Mellor v. Chamberlin*, 100 Wn.2d 643, 649, 673 P.2d 610 (1983).

proceeding" can be awarded to the non-contemptuous party. Since a contempt order was entered against Mr. Young, an award of attorney fees to the Ambauens was statutorily authorized.

4. The Ambauens were properly awarded their attorney fees and costs associated with prosecuting Mr. Young's contempt.

The trial court granted partial summary judgment in favor of the Ambauens on August 26, 5005. (CP 147 – 149) Mr. Young was given 90 days to "remove all vehicles in excess of those allowed to be stored." (CP 148) Mr. Young failed to comply with this order and the Ambauens were forced to come to court several times to force Young's compliance with the injunction. (CP 382 – 488)

RCW 7.21.030(3) allows the court to:

> Order a person found in contempt of court to pay a party for any losses suffered by the party as a result of the contempt and any costs incurred in connection with the contempt proceeding including reasonable attorney fees.

To qualify, the contempt "must be of a lawful order and have been committed willfully."[12] The Ambauens incurred fees and costs in various contempt proceedings to enforce the court's August 26, 2005, order. Thus, they were entitled to an award of their attorney fees under this statute.

5. The trial court properly reduced the attorney fees for work unrelated to the public nuisance claim and contempt orders.

During the June 1, 2007, hearing on the Ambauens' motion for attorney fees, the court addressed Mr. Young's concern over which fees were

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[12] *State ex rel. Lemon v. Coffin*, 52 Wn.2d 894, 898, 327 P.2d 741 (1958).

covered by the public nuisance and contempt statutes. On the record, the court carefully inquired into each issue raised by Mr. Young, ultimately disallowing some of the fees. (6/1/07 RP 10 – 12)

Witness the following colloquy:

> THE COURT: Alright. My next question for you relates to the co-defendant issue. As I look at page seven of your slip listings, I do see a couple of hours for the deposition of Ms. Young. And you had mentioned something in passing about that she hadn't appeared and a sanction had been taken, and so I'm curious as to the inclusion of that particular timing. And I know there's a couple of other things in that time slip.
>
> MR. BROUGHTON: You were right about that. And I would ask the court to delete the entries, I believe, from the second entry on that page seven to the third entry from the bottom, are related to the deposition and those should not have been included.
>
> THE COURT: Alright. So the $440 -- the 22 and 26, is that what you are talking about?
>
> MR. BROUGHTON: Yes, Your Honor. Well, no. The 440 goes up $25.50, $22, $44 and $8.50, those entries. 10/14 through 11/14.

(6/1/07 RP 11:5 – 23)

It is clear from this record that the trial court accepted the argument made by Mr. Young that some of the time entries related to co-defendant Lorna Young should not be included in the fee award. Despite the fact that Mr. Young prevailed on this issue, he raises it again on appeal.[13]

The record of the June 1, 2007, hearing similarly shows that the trial court accepted Mr. Young's argument that attorney fees related to a Sheriff's sale should not be awarded. The court stated:

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[13] Opening Brief of Appellant at 20 – 23.

> THE COURT: Mr. Young, let's say that I accept your argument that shows Sheriff's sale fees shouldn't be included. Can you point me to where in the slip listing that those fees are that you object to not relating to the Sheriff's sale.
>
> MR. YOUNG: Yes. There's conference calls associated with it. Let me just see if I can find that again.
>
> MR. BROUGHTON: If I might, Your Honor, pages three and four.
>
> MR. YOUNG: Yes, there it is. Thank you. Conference with KCSO.
>
> And apparently I'm not sure what's going on there, but two or three times it was scheduled or cancelled or rescheduled or something. I can't tell what was going on from that slip listing. All I know, when I finally became aware of it, my mother had received no notice because she had moved.
>
> . . .

(6/1/07 RP 14: 20 – 15: 12)

Ultimately, the court reduced the fees by over $1,500.00. (6/1/07 RP 17:6 – 23)

As this record reflects, the trial court made detailed findings with regard to attorney fees that were disallowed and Mr. Young's arguments to the contrary fail.[14]

C. The trial court properly denied Mr. Young's motion in limine regarding testimony and evidence relating to the junk vehicles Mr. Young stored on his property.

"A motion in limine is addressed to the discretion of the trial court and will be reversed only in the event of abuse of discretion."[15]

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[14] Opening Brief of Appellant at 23.

[15] *Equitable Life Leasing Corp. v. Cedarbrook, Inc.*, 52 Wn. App. 497, 503, 761 P.2d 77 (1988) (citing *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 91, 549 P.2d 483 (1976)).

1. Mr. Young objected to only two photographs.

Mr. Young incorrectly asserts he had a standing objection to any and all photographic evidence that might have been offered into evidence by the Ambauens. The trial court specifically instructed Mr. Young that he was required to object during the course of trial at the time the Ambauens offered photographic evidence. First, in the course of ruling on Mr. Young's Motion in Limine, the court stated the Ambauens could admit photographic evidence for the limited purpose of placing the matter in context. (RP 31:8 – 10) She then directed Mr. Young to object "if it's going beyond the context argument." (RP 21:12 – 14) During trial, Mr. Young objected to only two exhibits – Exhibit No. 10 (RP 76:7 – 11), an aerial photograph of the property which the court admitted as an illustrative exhibit only, and Exhibit No. 20, a photo of the Ambauens' garden. Mr. Young did not object to any other photos. Rather, he simply argued during trial that the Ambauens might attempt to introduce additional photographic evidence and in response the court instructed, "When they are offered, then you make your objections and I will consider them." (RP 189:15 – 17)

The case law is clear that, when the trial court has specifically stated that objections must be made at the time evidence is offered, a ruling on a motion in limine is considered tentative or advisory only.[16] In that event, an objection during trial when the evidence is offered is necessary to preserve

[16] *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 620 – 22, 762 P.2d 1156 (1988).

the matter for appeal.[17] Thus, the only alleged error properly preserved for appeal relates to Exhibits No. 10 and 20. (RP 179:1 – 18; 179:23 – 180:1) Even if Mr. Young had preserved objections to any other photos, he fails to point out in the record where any such photos were admitted into evidence. Thus, Mr. Young cannot show that the trial court addmitted the evidence, much less that the court erred, much less that the error was outcome determinative and provides grounds for reversal.

2. *The trial court did not abuse its discretion in allowing the Ambauens to use the two photos.*

The court allowed the Ambauens to introduce a photograph of their garden into evidence. (Exhibit No. 20; RP 179:19 – 180:7) As the court noted, Mr. Young had "asked Ms. Ambauen a number of questions regarding the property and the use of the property on direct, these are relevant, so 20 is admitted . . . ." (RP 180:8 – 11) Mr. Young does not even attempt to argue that admission of Exhibit No. 20 was error. Therefore, the only issue before the Court is whether it was proper for the court to allow Exhibit No. 10 to be used for illustrative purposes.

Exhibit No. 10 was simply an aerial photograph of the property at issue. The court allowed the Ambauens to use it to show the property and its boundaries. (RP 75:22 – 77:2) The court did not allow the photograph to be admitted into evidence and it did not go to the jury room with the jury. The court did not abuse its discretion in allowing the illustrative use of the photo.

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[17] *Id.*

Mr. Young relies on ER 403 as the basis for his argument that the photograph should not have been used for illustrative purposes. That rule provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Mr. Young incorrectly argues that an on the record balancing of probative value versus prejudice is required under ER 403.[18] In support of that argument, he cites the Court of Appeals decision in *Carson v. Fine*,[19] which was reversed by the Supreme Court.[20] In that medical malpractice case, the defendant was allowed to present expert testimony from the plaintiff's treating physician that it was his opinion the defendant doctor's conduct was well within the standard of care. The Court of Appeals concluded the expert testimony of the plaintiff's "treating physician presented by the defense, inevitably presents a high risk of unfair prejudice" and concluded the trial court should have done an on the record balancing.[21] The Supreme Court disagreed.

The Supreme Court explained that ER 403 was different from ER 609 (impeachment by evidence of conviction of a crime) and ER 404(b) (evidence of other crimes, wrongs, or acts), rules under which an on the record balancing is required:

> Under ER 403, the relevance of the evidence sought to be admitted is assumed. The only question is whether its probative value is outweighed by its prejudicial effect. In contrast, evidence falling within ER 404(b) is relevant only for

[18] Appellant's Opening Brief at 30 – 31.
[19] 67 Wn. App. 457, 836 P.2d 223 (1992).
[20] 123 Wn.2d 206, 867 P.2d 610 (1994).
[21] 67 Wn. App. at 464 – 65.

> certain purposes and the court must determine whether the relevance of prior misconduct and the purpose for which it is being offered have been established before it admits such evidence. Similarly, evidence of a prior conviction under ER 609 is admissible only when it is relevant to the credibility of evidence under ER 403, unlike ER 404(b) and ER 609, does not depend on the purpose for which it is offered. Thus, the rationale for requiring the trial court to weigh its decision on the record under ER 404(b) and ER 609 is not present in the case of an ER 403 objection. [22]

"[U]nder ER 403, the burden of showing prejudice is on the party seeking to exclude the evidence."[23] Mr. Young did not satisfy his burden. As the Supreme Court has noted, the issue under ER 403 is whether the evidence creates "unfair prejudice."[24] As the court stated:

> [N]early all evidence will prejudice one side or the other in a lawsuit. Evidence is not rendered inadmissible under ER 403 just because it may be prejudicial. We note, for example, that accurate but graphic photographs are admissible even when repulsive or gruesome if their probative value outweighs their prejudicial effect. . . . By the same token, police officers are allowed to testify in uniform, even if their presence is prejudicial to a defendant. . . . Various types of evidence and witnesses prejudice one party or the other; prejudicial evidence and credible witnesses make lawsuits. Under ER 403 the court is not concerned with this ordinary prejudice. . . .[25]

The Ambauens do not agree that the photograph was prejudicial. However, even if it was, any prejudice was simply the "ordinary prejudice" created when a party introduces evidence. It does not rise to the level of undue, unfair prejudice that required exclusion ER 403. Mr. Young fails to

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[22] 123 Wn.2d at 222 – 23.
[23] *Id.* at 225, 867 P.2d 610 (1994).
[24] *Id.* at 223.
[25] *Id.* at 224 (internal citations omitted).

cite to any part of the record where he claims Exhibit No. 10 was used in an improper manner in an attempt to create "unfair prejudice." The trial court, therefore, did not abuse its discretion in allowing Exhibit No. 10 to be used as an illustrative exhibit.

D. The trial court properly excluded expert witness Callaghan because his testimony would have been cumulative.

The trial court's decision to exclude Mr. Young's second expert witness is reviewed for abuse of discretion.[26]

The report prepared by Mr. Young's second expert witness, Joe Callaghan, was not provided to the Ambauens' attorney until December 10, 2010. (CP 535) The trial was scheduled to begin less than 30 days later, on January 3, 2011. The Ambauens moved for exclusion of Mr. Callaghan, citing Mr. Young's failure to disclose him sooner. (CP 500 – 503) In addition, at the hearing on the motion, the Ambauens' counsel argued that

> the plaintiff has experts. This Callaghan fellow is duplicative of experts that the plaintiff previously disclosed and who we were relying on would testify. . . . Rodman was his wetlands expert, and that's who we knew about, then he brings now cumulative evidence that will take extra time, perhaps confuse the jury as to why they are both wetlands people. There's no difference in what they are qualified to talk about. They are duplicative, they are cumulative, and the court should exclude Mr. Callaghan . . . .

(RP 14:12 – 24)

The trial court excluded Mr. Callaghan, specifically finding that the Ambauens would be prejudiced if he were allowed to testify. (RP 22:15 –

[26] *Christensen v. Munsen*, 123 Wn.2d 234, 241, 867 P.2d 626 (1994).

22:21) Although the court stated Mr. Callaghan was excluded because Plaintiff was introducing a new theory into the case, her decision may be upheld "on any basis supported by the record."[27]

The record shows that the court did not exclude Mr. Callaghan as a sanction for a discovery violation. Therefore, the parties were not required to conduct a discovery conference under CR 26(i), nor was the court required to make the findings set forth in *Burnet v. Spokane Ambulance*.[28]

By excluding Mr. Callaghan, the court was ultimately exercising the discretion granted to her under CR 16(a)(4):

> **(a) Hearing Matters Considered.** By order, or on the motion of any party, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:
>
> . . .
>
> (4) The limitation of the number of expert witnesses;

The record supports argument the Ambauens asserted at the hearing that Mr. Callaghan's testimony would have been unnecessarily duplicative of the testimony from Mr. Young's original expert. Thus, the trial court's decision to exclude Mr. Callaghan should be upheld under ER 403.

The court record does not include a copy of Mr. Callaghan's report, but Mr. Young stated during argument on the motion to exclude Mr.

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[27] *Hadley v. Cowan*, 60 Wn. App. 433, 804 P.2d 1271 (1991) (citing *LaMon v. Butler*, 112 Wn.2d 193, 200-201, 770 P.2d 1027 (1989)).

[28] 131 Wn.2d 484, 933 P.2d 1036 (1997). Even if the court had been required to make the *Burnet* findings, her failure to do so would not support vacation of the jury verdict. Rather, the appropriate remedy would be a remand to allow the trial court to make the required findings on the record. However, because the court did not exclude the witness as a sanction for a discovery violation, such a remand is not necessary.

Callaghan what his anticipated testimony would be, including the fact that:

> because the wetlands undergrowth, which is typically salmonberry and some reed rush, canary grass, some kind of grass, was mowed down and sprayed with herbicide, that this reed canary grass has come in and it's an invasive species, it's not supposed to be here, and it had migrated. There had been some from the south end that had come in from Mr. Ambauen's end, and it's his assessment, and he explained it quite patently, that when this reed canary grass comes in, you have to remove the soil that contains the roots in there to get it out of there. He says you have to take out about 12 inches of soil, then when you reconstitute the soil or supplement the soil, you have to come back in and baby-sit the plants until a canopy develops such that the canary grass underneath will no longer have to be pulled out, the little sprouts that might come up. So in other words, that's where the maintenance comes in. All of this has to be maintained for about three years until such time as the salmonberry returns to provide the canopy for the rest of the wetlands.

(RP 18:14 – 19:8) Mr. Young was already intending to present testimony from Mr. Rodman, whose report included the following opinion:

> Restoration of wetlands will require removal of unnatural overburden, distribution of additional hydratic soils, and replanting of wetlands grasses and vegetation. Restoration of native wetlands vegetation is typically labor intensive and expected to continue for several years.

(CP 332) Thus, Mr. Young already had an expert he intended to present who was going to testify that soil had to be removed, additional soils would have to be brought in, replanting of grasses and vegetation would have to occur, and the whole process would continue for several years.

Mr. Rodman testified at trial regarding his observations at the property. (RP 301:20 – 303:11; 304:15 – 305:10) He also testified regarding

his opinion as to what restoration would be necessary:

> You need to excavate the previously backfill soil out, because the aquatic plants can't grow in that type of soil.
>
> . . .
>
> Q And, so, what would be involved in removing the canary grass to facilitate –
>
> A It would have to be dug out. Canary grass of course would be taken out as – canary grass, the roots can go down to 18 inches, so sometimes you just can't really cut it back or weed because it will be back fairly quickly and maybe bigger than it started out. So the only thing you can really do with it is excavate it out, and once you do that, then of course you need to probably – I estimated you would need to bring in, you know, probably a couple hundred years of replacement soil, and that would have to be a hydratic-type soil.
>
> . . .
>
> Q And once the replacement soil goes in, then what kind of process is involved continuing down the path toward –
>
> A There's a maintenance period where you have to make sure the canary grass – you have to do weeding, and if any canary grass sprouts up, you have to basically get a shovel and dig it out.

He also testified regarding the replanting that would be necessary. (RP 317:3 – 20). Mr. Young was, therefore, allowed to present, through Mr. Rodman, the same opinions he intended to have Mr. Callaghan express. As a result, he was not prejudiced in any way by the exclusion of Mr. Callaghan as a witness.

The trial court's decision was proper based upon the discretion granted to her under CR 14(a)(4) and under ER 403. Her decision should, therefore, be upheld.

E. Mr. Young was not prevented from cross-examining expert witness Marc Boule on all relevant matters.

Mr. Young argues that the trial court erred in some unspecified way by allowing Mr. Boule to testify.[29] However, Mr. Young fails to assign any specific error with regard to that evidence and he fails to point out anywhere in the record that he objected to the admission of the evidence. Mr. Young never moved for the exclusion of Mr. Boule's testimony either before or during the trial. Moreover, it is impossible to discern what issue Mr. Young is asking this Court to consider. Those arguments in Mr. Young's brief should, therefore, be disregarded.[30]

The only issue regarding Mr. Boule's testimony to which Mr. Young has assigned error is as follows:

> F. The trial court erred when it barred Young's cross examination on the basis of Boule's opinions on permitting and other requirements that were inconsistent with directives in Department of Ecology/Army Corps of Engineers Wetlands Manual.[31]

Mr. Young devotes just two paragraphs to this purpoted error, on page 46 of his Opening Brief. He claims that "each time Young raised the Wetlands Manuals, or its requirements, he was cut off by Judge Haberly unfairly ordering Young to terminate the line of questioning."[32] Yet he provides no citation to the record where he contends this occurred. The record does

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[29] Opening Brief of Appellant at 38 – 46.
[30] *Ang v. Martin*, 154 Wn.2d 477, 486 – 87, 114 P.3d 637 (2005).
[31] Appellant's Opening Brief at 8.
[32] *Id.* at 46.

show, however, that Mr. Young was allowed to extensively cross-examine Mr. Boule as to his opinions on permitting. (RP 470:17 – 476:10; 486:24 – 488:1) When Mr. Young's questioning began to stray into the area of federal jurisdiction over the permitting process, there was an extended colloquy with the court regarding the issue. (RP 488:2 – 491:16) Mr. Young asserted he needed to question Mr. Boule on the issue to support his theory that permitting was required, but the Ambauens' counsel pointed out that "Mr. Rodman testified to that. He's got his evidence in that he needs a permit." (RP 490:16 – 18) The court noted that Mr. Young had "just been kind of going in circles, coming back to the same subjects." (RP 490:21 – 22) She summarized the issue as follows:

> There's been no wetland delineation done. That's been established by this witness about five times, and he said that's what he would have to do before you go to a permit stage.

(RP 491:2 – 5) She then instructed Mr. Young that she was "going to limit some of your examination." (RP 491:13 – 14) Mr. Young was then allowed to engage in further questioning of Mr. Boule regarding permitting. (RP 499:20 – 506:17) In response to a question about the "threshold where permitting would be required," Mr. Boule testified that, because the pond on the property was man-made and the project was so small, the permitting agencies probably would not concern themselves with it:

> There is a great deal of variability in how the resource agencies address the permits required, especially at the scale

> that we are looking at here. And recognizing that the pond is a man-made feature, was partially funded by federal agencies, is now considered exempt from most jurisdictional responsibility, jurisdiction obligations because of it being a man-made feature, and that during the course of making of that man-made feature, other disturbances came forward, the agency representative who was present at the time, which is back in 1970 – I don't know whether he was on site, he or she was on the site at the time – but spoke to maintaining it, leaving the pond in a neat and pleading – I believe the phrase was neat and pleasing, pleasing to the eye, and no further, so that came before any and all of these regulations were ever implemented or even on the books. And generally speaking, the resource agencies, their responses were, not sure I want to spend a lot of time on that project given the scale and history and so on and so forth.

(RP 505:18 – 506:17)

To the extent the trial court limited any of Mr. Young's cross-examination of Mr. Boule it was within her discretion to limit presentation of cumulative evidence under ER 403. Any issues regarding the cross-examination of Mr. Boule's testimony are, therefore, insufficient to support vacating the jury's verdict.

F. The trial court's jury instructions were proper based upon the evidence.

The trial court's decision regarding jury instructions is reviewed under the abuse of discretion standard.[33]

1. Only those instructions to which Mr. Young objected at trial should be considered by this Court.

Following trial, Mr. Young objected to the court's decision not to give his proposed instructions 15 (RP 556:12 – 21), 18 (RP 550:24 – 55:1), 19 (RP

[33] *Herring v. Dept. of Social and Health Services*, 81 Wn. App. 1, 21, 914 P.2d 67 (1996).

549:8 – 17) and 20 (1/11/11 RP 16:11 – 14). He did not object to the court's decision not to give any of his other instructions, nor did he object to the court's decision to give the Ambauens' proposed instruction on trespass.

This Court should not consider Mr. Young's arguments regarding any of the instructions to which he failed to object.[34] Mr. Young admits that he failed to object to any instructions other than those specified above. He argues the court's decision regarding the jury instructions is a manifest error affecting a constitutional right, but he fails to explain why the court's instructional decisions rise to such a level. It appears the majority of cases allowing review of jury instructions under RAP 2.5(a)(3) involve criminal prosecutions, not a civil dispute.[35] Mr. Young presents no viable argument at to why this Court should consider arguments regarding those instructions to which he did not object.

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[34] RAP 2.5(a); *Christensen*, 123 Wn.2d 234 at 247.

[35] *See State v. Scott*, 110 Wn.2d 682, 688 n 5, 757 P.2d 492 (1988) ("Examples of 'manifest' constitutional errors in jury instructions are: directing a verdict, *State v. Peterson*, 73 Wn.2d 303, 306, 438 P.2d 183 (1968); shifting the burden of proof to the defendant, *State v. McCullum*, 98 Wn.2d 484, 487–88, 656 P.2d 1064 (1983); failing to define the "beyond a reasonable doubt" standard, *State v. McHenry*, 88 Wn.2d 211, 214, 558 P.2d 188 (1977); failing to require a unanimous verdict, *State v. Carothers*, 84 Wn.2d 256, 262, 525 P.2d 731 (1974); and omitting an element of the crime charged, *State v. Johnson*, 100 Wn.2d 607, 623, 674 P.2d 145 (1983), *overruled on other grounds, State v. Bergeron*, 105 Wn.2d 1, 711 P.2d 1000 (1985). Instructional errors that do not fall within the scope of RAP 2.5(a)(3) include failure to instruct on a lesser included offense, *State v. Mak*, 105 Wn.2d 692, 745–49, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986); and failure to define individual terms. *See infra.")*

2. *The trial court properly declined to give Mr. Young's proposed instructions 18 and 19 as there was insufficient evidence to support those causes of action.*

The court concluded there was insufficient evidence to support a claim for waste or timber trespass and, therefore, declined to give Mr. Young's timber trespass and waste instructions. Mr. Young has failed to show the record includes evidence sufficient to support those claims.

"A party is entitled to instructions on the party's theory of the case if substantial evidence supports the theory."[36] "Evidence is substantial if it would convince an unprejudiced, thinking mind of the truth of the declared premise."[37] Mr. Young did not present substantial evidence in support of his waste and timber trespass theories.

Mr. Young objected to the court's failure to give his proposed instruction number 18:

(Waste by Trespasser)

> Any waste or object placed on the land of another without authorization of the land owner constitutes a trespass, and remains a continuing trespass for as long as the trespass object or waste remains on the land. On the event of transfer of ownership of a land where any continuing trespass is occurring, the right to legal action on continuing trespass is transferred to the new land possessor.

(CP 601)

The court concluded this instruction was not an accurate statement of

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[36] *Herring*, 81 Wn. App. at 25 (citing *Delahunty v. Cahoon*, 66 Wn. App. 829, 837, 832 P.2d 1378 (1992)).

[37] *Id.* (quoting *Jefferson County v. Seattle Yacht Club*, 73 Wn. App. 576, 588, 870 P.2d 987 (1994)).

the law and that there was insufficient evidence to support this instruction. Waste is defined as:

> an unreasonable or improper use, abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession which results in its substantial injury. It is the violation of an obligation to treat the premises in such manner that no harm be done to them and that the estate may revert to those having an underlying interest undeteriorated by any willful or negligent act.[38]

The trial court was, therefore, correct in concluding the proposed instruction did not properly define "waste."

Even if the instruction is treated as one intended to address a continuing trespass as opposed to waste, the record reflects there was insufficient evidence to support the instruction. For example, the evidence regarding the bridge that was allegedly built partially on Mr. Young's property was not sufficient to support the instruction. Mr. Young admitted that, even though he was aware of the bridge, he never asked the Ambauens to remove it. More importantly, Mr. Young failed to present any evidence that the presence of the bridge had caused any damage to his property. Similarly, he presented no evidence that a small rowboat being left on his property for some unspecified period of time caused him any damage. Therefore, the trial court properly concluded there was insufficient evidence to give Mr. Young's proposed instruction number 18.

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[38] *Kane v. Timm*, 11 Wn. App. 910, 911, 527 P.2d 480 (1974) (quoting *Graffell v. Honeysuckle*, 30 Wn.2d 390, 398, 191 P.2 858 (1948)).

Mr. Young also objected to the court's decision not to give his proposed instruction number 19:

> A Washington State statute provides:
>
> > **Injury to or removing trees, etc. – Damages** Whenever any person shall cut down, girdle or otherwise injure, or carry off any tree, timber or shrub on the land of another person, or on the street or highway in front of any person's house, village, town or city lot, or cultivated grounds, or on the commons or public grounds of any village, town or city, or on the street or highway in front thereof, without lawful authority, in an action by such person, village, town or city against the person committing such trespass or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefor, as the case may be.
>
> As to the damage to ornamental trees and shrubbery: the proper measure of damages for the wrongful destruction of ornamental trees and shrubbery which did not decrease the value of the land is the intrinsic value of the trees and shrubbery removed.

(CP 602) The court concluded there was insufficient evidence to support this instruction. This decision is supported by the record. Mr. Young testified that he found a pile of branches and surmised the Ambauens must have cut them from his trees. He also claimed the Ambauens cleared some salmonberry bushes from his property. The court correctly concluded this evidence was simply insufficient to constitute a timber trespass. The instruction speaks only to the trebling of damages, which implies there must first be damage found. The fact that the jury returned a verdict in the

Ambauens' favor indicates that no damage was found. Thus, it was unnecessary for a trebling instruction to be given.

Mr. Young's proposed instruction number 20 set forth the provisions of RCW 4.24.630(1):

> Every person who goes onto the land of another and who removes timber, crops, minerals, or other similar valuable property from the land, or wrongfully causes waste or injury to the land, or wrongfully injures personal property or improvements to real estate on the land, is liable to the injured party for treble the amount of the damages caused by the removal, waste, or injury. For purposes of this section, a person acts "wrongfully" if the person intentionally and unreasonably commits the act or acts while knowing, or having reason to know, that he or she lacks authorization to so act. Damages recoverable under this section include, but are not limited to, damages for the market value of the property removed or injured, and for injury to the land, including the costs of restoration. In addition, the person is liable for reimbursing the injured party for the party's reasonable costs, including but not limited to investigative costs and reasonable attorneys' fees and other litigation-related costs.

(CP 604) The courts have recognized that this statute "envisions wrongful conduct" and "any violation of that statute is analogous to an intentional tort like trespass to personal property or conversion."[39] The trial court concluded there was insufficient evidence to give this instruction. Mr. Young has failed to cite to any evidence that would establish the Ambauens' conduct was intentional. Thus, the court's decision not to give the instruction was proper.

[39] *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 246, 23 P.3d 520 (2001).

3. The trial court properly declined to give Mr. Young's proposed instruction number 15.

Mr. Young's proposed instruction 15 is a four-page recitation of his claims. (CP 594 – 597) The court declined to give it because it was an improper commentary on the evidence. (RP 556:12 – 18) Mr. Young does not cite any authority that would support giving such an instruction. Therefore, the court's decision was proper and does not constitute reversible error.

4. Mr. Young did not object to Jury Instruction Number 8.

Jury Instruction Number 8 set forth the definition of trespass. (CP 640) Mr. Young did not object to the giving of this instruction. This court should, therefore, not consider his attempts to now argue the instruction was improper because it stated substantial damage was required to prove the trespass claim.[40]

In addition to failing to object to the trespass instruction, Mr. Young failed to proposed his own trespass instruction that accurately stated the law. "If a party is not satisfied with an instruction, it must propose a correct instruction. If a party fails to propose a correct instruction, it cannot complain about the court's failure to give it."[41] His proposed instruction number 11 set forth the definition of "trespasser" in WPI 120.01. (CP 593) The note on use for that instruction states, "Use WPI 120.02, Duty to

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[40] Appellant's Opening Brief at 64.
[41] *Crittenden v. Fibreboard Corp.*, 58 Wn. App. 649, 655, 794 P.2d 554 (1990).

Trespasser, with this instruction." Therefore, it is clear that the proposed instruction is to be given when the claim at issue involves an injury by a party against the owner of the land and the owner claims the party was a trespasser. It was not a proper definition of a "trespasser" for purposes of the present matter. Mr. Young's arguments regarding jury instruction number 8 should, therefore, not be considered.

Finally, Mr. Young failed to present substantial evidence supporting the conclusion that the Ambauens' alleged trespass caused him any damage. Therefore, even if the use of the word "substantial" in instruction 8 could be considered erroneous, any such error was harmless.

G. The trial court properly awarded the Ambauens their attorney fees because Mr. Young did not improve his position in the trial *de novo*.

Mr. Young was awarded nothing at arbitration and was, likewise, awarded nothing at trial. The trial court, therefore, awarded the Ambauens their attorney fees under RCW 7.06.060(2):

> (1) The superior court shall assess costs and reasonable attorneys' fees against a party who appeals the award and fails to improve his or her position on the trial de novo. . . .

Mr. Young argues on appeal that the arbitrator lacked jurisdiction to hear his counterclaim and, therefore, RCW 7.06.060 cannot apply.

Mr. Young asserts that immediately before the arbitration was to begin, he told the arbitrator he was claiming in excess of $50,000 in damages, so the matter should not be arbitrated. Mr. Young argues that he received the

report from his expert witness, Robert Rodman, too late to make the argument any sooner.[42] Mr. Rodman estimated the cost to "restore" Mr. Young's property was $48,600, an amount below the $50,000 jurisdictional limit. Mr. Young claims that he should have been allowed to value his case for purposes of mandatory arbitration by trebling the full amount in Mr. Rodman's report. Because he was not allowed to do that, he reasons the arbitrator lacked jurisdiction to hear the case.

The record directly contradicts Mr. Young's *post hoc* argument. Mr. Young submitted his arbitration Prehearing Statement of Proof on July 2, 2008. (CP 294 – 333) Attached to that Statement as Exhibit 13 was Mr. Rodman's report, dated June 25, 2008. (CP 332 – 33) Had Mr. Young believed Mr. Rodman's report somehow relieved the arbitrator of jurisdiction, he was free to raise that issue before the hearing by filing a motion with the trial court. He did not do so and, therefore, waived any such argument.

MAR 1.2 allows for the waiver of damages in excess of the $50,000 arbitration cutoff amount. Specifically, that rule provides:

> A civil action, other than an appeal from a court of limited jurisdiction, is subject to arbitration under these rules if the action is at issue in a superior court in a county which has authorized mandatory arbitration under RCW 7.06, if (1) the action is subject to mandatory arbitration as provided in RCW 7.06, (2) **all parties, for purposes of arbitration only, waive claims in excess of the amount authorized by RCW 7.06**,

[42] Appellant's Opening Brief at 24.

exclusive of attorney fees, interest and costs, or (3) the parties have stipulated to arbitration pursuant to rule 8.1.[43]

Mr. Young failed to timely raise any argument that his claim exceeded the jurisdictional amount. Mr. Young's last minute request to the arbitrator that the arbitrator decline hear the case was insufficient to preserve that argument. MAR 3.2 provides:

> **(a) Authority of Arbitrator.** An arbitrator has the authority to:
>
> (1) Decide procedural issues arising before or during the arbitration hearing, except issues relating to the qualifications of an arbitrator;
> (2) Invite, with reasonable notice, the parties to submit trial briefs;
> (3) Examine any site or object relevant to the case;
> (4) Issue a subpoena under rule 4.3;
> (5) Administer oaths or affirmations to witnesses;
> (6) Rule on the admissibility of evidence under rule 5.3;
> (7) Determine the facts, decide the law, and make an award;
> (8) Award costs and attorney fees as authorized by law; and
> (9) Perform other acts as authorized by these rules or local rules adopted and filed under rule 8.2.
>
> **(b) Authority of the Court.** The court shall decide:
>
> (1) Motions for involuntary dismissal, motions to change or add parties to the case, and motions for summary judgment; and
> (2) Issues relating to costs and attorney fees if those issues cannot otherwise be decided by the arbitrator.

This Rule does not grant the arbitrator authority to decide whether the matter before him is actually subject to arbitration. Rather, that is a matter left to the trial court's jurisdiction. MAR 1.3 provides:

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[43] Emphasis added.

> **(a) Superior Court Jurisdiction.** A case filed in the superior court remains under the jurisdiction of the superior court in all stages of the proceeding, including arbitration. **Except for the authority expressly given to the arbitrator by these rules, all issues shall be determined by the court**.[44]
> . . .

Mr. Young's failure to raise the jurisdictional issue with the trial court *before* the arbitration proceeded operated as a waiver of any claim in excess of the $50,000 jurisdictional amount for purposes of the arbitration. The trial court, therefore, properly awarded the Ambauens their attorney fees under RCW 7.06.060(2).

H. The Ambauens request an award of their attorney fees under RAP 18.1.

Pursuant to RAP 18.1, the Ambauens request their attorney fees on appeal under RCW 7.06.060(2).[45]

VI. CONCLUSION

For the reasons set forth above, the Ambauens request this court AFFIRM the judgment entered in the trial court and award the Ambauens their costs and attorney fees on appeal.

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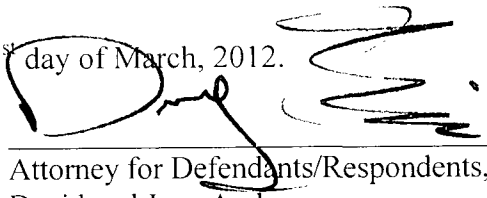
[44] Emphasis added.
[45] *Christie-Lambert Van & Storage Co. v. McLeod*, 39 Wn. App. 298, 309, 693 P.2d 161 (1984).

DATED this 1st day of March, 2012.



Attorney for Defendants/Respondents,
David and Jana Ambauen

David M. Jacobi, WSBA #13524
Shawnmarie Stanton, WSBA #20112
WILSON SMITH COCHRAN DICKERSON
901 Fifth Avenue, Suite 1700
Seattle, Washington 98164-2050
Telephone: 206.623.4100
FAX: 206.623.9273
Email: jacobi@wscd.com

DECLARATION OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington, that on the below date I electronically filed and caused to be served the attached document as follows:

VIA E-MAIL AND US MAIL TO ALL PARTIES

youngcf@basicisp.net
Colin Young, pro se Appellant
1785 Spirit Ridge Dr.
Silverdale WA 98383

(bethjensen@rjjensenlaw.com)
Attorney for Plaintiffs David Ambauen
and Jana Ambauen
Elizabeth A. Jensen
Richard J. Jensen, P.S. and Associates
1021 Regents Boulevard
Fircrest, WA 98466

William H. Broughton
(bill@bbroughtonlaw.com)
Broughton Law Group, Inc. P.S.
9057 Washington Ave. NW
Silverdale, WA 98383

DATED at Seattle, Washington this 1st day of March, 2012.

Betty Dobbins